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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TINA G. et al,

Petitioners,

v.

THE SUPERIOR COURT OF SAN  
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Real Party in Interest.

D038116

(San Diego County  
Super. Ct. No. J510726 A-D)

PROCEEDINGS seeking extraordinary relief after reference to a Welfare and Institutions Code section 366.26 hearing.<sup>1</sup> Gary Bubis, Referee. Petitions denied.

Tina G. seeks review of juvenile court orders terminating reunification services and setting a permanency planning hearing (§ 366.26). She contends the court erred

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

when after services were offered it retroactively denied reunification based on her past history of substance abuse. She argues the San Diego County Health and Human Services Agency's (Agency's) unreasonable failure to provide good faith services prevented her daughter, T.D.'s, placement with her in a mother-infant program for incarcerated mothers.<sup>2</sup> She requests this court vacate the order setting the permanency planning hearing and extend reunification services beyond the 18-month period. We granted leave to Legal Services for Prisoners with Children to file an amicus curiae brief in Tina's support. It argues her reunification plan should have included the mother-infant program.

Lashawn D., T.D.'s alleged father, petitions for review of the order setting a permanency planning hearing for T.D. He argues he was not notified in a timely manner so that he could attend and participate in the hearing.

We deny the petitions.

#### FACTUAL AND PROCEDURAL BACKGROUND

Tina has four children: S.C. (born 1988), S.A. (born 1993), M.G. (born 1994), and T.D. (born 1996). Tina has a long history of abusing illicit drugs and of prostitution to support her drug habit. M.G. tested positive for cocaine at birth, was detained and became a dependent of the juvenile court. S.A. was made a dependent of the court because at age two, while in the custody of her alleged father, she was molested by the

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<sup>2</sup> Although the court set the permanency planning hearing for all of Tina's four children, her arguments concern only her youngest child, T.D., the only one of her children young enough to qualify for the mother-infant program.

teenage son of her caretaker. At the time, Tina was in custody for violating parole. T.D. was healthy at birth. When T.D. was four months old, Tina relapsed into drug use and then entered into a voluntary plan to prevent T.D.'s removal. Subsequently, M.G. and S.A. were reunited with Tina and jurisdiction was terminated on June 2, 1997.

In September 1998 S.C. was declared a dependent because her guardian, her paternal grandmother, allowed her to have contact with her father and her paternal aunt, who were registered sex offenders. On October 20, 1998, the court terminated S.C.'s guardianship and on Agency's recommendation, placed her with Tina. On May 5, 1999, the court terminated its jurisdiction over S.C., giving Tina full custody.

In February 2000 Tina was arrested for auto theft. She was detained for a few days and the children were left with caretakers. Following her release, she could not be located. S.C. said Tina had been working as a prostitute and she had seen her abusing drugs. On March 1, 2000, Agency petitioned on behalf of the children under section 300, subdivisions (b) and (g), alleging that from August 1999 to February 2000 Tina used marijuana, methamphetamine and cocaine in their presence and the parents' whereabouts were unknown. The court referred Tina for a Substance Abuse Recovery Management Systems (SARMS) evaluation. On March 23 it found the allegations of the petitions true. At the disposition hearing on April 20, the court placed the children in foster care and ordered paternity testing for Lashawn. Tina's reunification plan included substance abuse testing and treatment, parenting classes and counseling.

Tina complied with the requirements of her reunification plan until September 14 when the court terminated her from SARMS because she was incarcerated. The court

ordered Agency to look into what drug programs would be available for Tina in prison and ordered she would have reasonable visits.

At the six-month review hearing on October 17, the court ordered Agency to continue to provide services, ordered reasonable visitation and continued the children as dependents placed in foster care.

At the 12-month review hearing held May 16 and June 7 and 8, 2001, Tina was present and represented by counsel. On the second day of the hearing, Lashawn's counsel moved for a continuance because Lashawn was incarcerated and wanted to attend. The court denied the motion on the grounds Lashawn was only an alleged father and trial was already in its second day.

In her report, the social worker stated Tina's expected release date is October 2002. Because this date would be long after the 18-month date of the children's dependency in September 2001, she opined there was no substantial probability of reunification by that time. She testified T.D. and M.G. were placed together in a foster home. S.C. and S.A. were in different foster homes. She testified she had taken all four children to visit Tina at California Institute for Women and they complained about the long car ride and said they only wanted to visit if Tina were at Los Colinas. After Tina moved to Los Colinas in March the social worker arranged two more visits. Tina also contacted the children by telephone and letter and was in regular communication with the social worker.

The social worker testified she spoke with Tina about her services during the March 23, 2001 visit and that Tina said she would look into parenting classes at the

prison. The social worker testified Tina did not request help in getting services between November 2000 and March 2001, but did call her about the mother-infant program at the prison. It was the social worker's understanding that only T.D. would be eligible to participate because the program was for children under the age of five. She stated Tina gave her the telephone number of Carol Grisotti, who was associated with the program. She called Grisotti, who said she was working with Tina to apply for the program. The social worker testified she and her supervisor determined the mother-infant program was not appropriate because Tina would be incarcerated until October 2002 and it would be detrimental to separate T.D. from M.G. because the two children had lived together all of their lives. She said she tried to contact Grisotti several times, but Grisotti did not return her calls. The social worker testified she did not send Tina a prison packet until after the 12-month hearing began. She said when she became aware Tina was interested in the mother-infant program she explained to her that T.D. would not be placed in the program because Tina's release date was not until October 2002.

S.C. testified she had not seen Tina since their visit at the California Institute for Women. She said when Tina had asked her about her foster home, adoption and boyfriends, she became upset and did not want to visit anymore. However, she would visit if Tina did not talk about the case. She testified she was angry because Tina would do well for a while, then "mess up" and go to jail again and this pattern happened over and over. S.C. said she did not want to leave her foster home.

Tina made an offer of proof that if the director of the mother-infant program were called to testify she would say she could not guarantee that Tina would be accepted into

the program, but did not see any reason why she would not, and T.D. could be placed with her by September 1, 2001. The parties stipulated children in the program must be under the age of six.

Tina testified she had been incarcerated since September 6, 2000. She said until she was sent to prison she had complied with the requirements of her reunification plan and had applied for a parenting class and drug recovery program while in prison. She explained she had sent a letter about the mother-infant program to the social worker, but the social worker had not opened it at first because she thought it was a letter for the children. She said the social worker told her Agency would not support her application for the program because it was recommending the children be adopted. She also said she had completed the prison packet the social worker had sent after the hearing began.

The court found the children would be at a substantial risk of detriment if they were returned to Tina. It found by clear and convincing evidence that reasonable services were offered and provided and there was no substantial probability of return by the 18-month date. The court terminated reunification services and set the matter for a permanency planning hearing (§ 366.26).

## DISCUSSION

### *I. Lashawn's Petition*

Lashawn petitions to set aside the order setting a permanency planning hearing for T.D. He argues he is incarcerated and was not notified in a timely manner about the 12-month hearing. He claims with better notice he could have provided input as to the person he wants to raise T.D.

We first note that on May 16, the first day of the three-day hearing, S.C.'s father's counsel appeared specially for Lashawn's counsel and stated Lashawn was not taking a position. He did not object that Lashawn was not present, nor move for a continuance because of a lack of notice. It was not until the second day of the hearing, June 7, when S.C.'s father's counsel was again specially appearing, that he requested a continuance so that Lashawn could be produced. At that time he did not argue that Lashawn had not received notice but, instead, stated Lashawn's counsel had informed him that "[Lashawn] was aware of these proceedings and wanted to be present for the court hearing; and based on that representation, was requesting a continuance in order to produce [Lashawn] for these hearings."

Section 316.2, subdivision (a) requires the court to inquire at the time of the detention hearing or as soon as possible as to the identity and addresses of all presumed or alleged fathers. Section 316.2, subdivision (b) provides that each alleged father shall be provided with notice by certified mail stating that he is or could be the father of the child and that the child is the subject of proceedings which could result in termination of parental rights. Section 366.21, subdivision (b) requires notice of review hearings be

mailed "to the same persons as in the original proceeding, to the child's parent or legal guardian, to the foster parents . . . ." The record does not indicate that Lashawn ever achieved the status of a presumed father.

Whether or not Lashawn was entitled to strict compliance with the notice requirements of section 366.21, the record shows he received actual notice of the proceedings and he has not shown prejudice. S.C's father's counsel appeared for him at the six-month review hearing and the record shows Lashawn was sent a copy of the record of the hearing including the date of the 12-month hearing. The record also shows his counsel was sent a copy of the minute order indicating the date of the permanency planning hearing. In addition, the minute order from a special hearing on April 27, 2001, regarding T.D's return to her foster family, indicates Lashawn's counsel was present and Lashawn was sent a copy of the order. As indicated above, counsel at the June 7 proceeding stated Lashawn was aware of the proceedings. Lashawn had actual notice and he has not shown prejudice by a failure to comply strictly with notice requirements. "The lack of strict compliance with section 366.21, subdivision (b), in the absence of prejudice, does not render the subsequent proceedings void." (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1419.)

Also, Lashawn has not shown the court abused its discretion in denying his motion for a continuance so he could be produced for the hearing.

The juvenile court has discretion to grant a continuance of a hearing only upon a showing of good cause and for the time shown to be necessary. (§ 352, subd. (a), *In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1187.) "In considering the minor's interests, the



court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (§ 352, subd. (a).) The reviewing court will reverse the denial of a continuance only upon a showing of an abuse of discretion. (*Ibid.*) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. . . ." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319, quoting *Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.)

As stated above, Lashawn had actual notice and representation at the hearing. He did not request a continuance until the second day of the three-day hearing and a continuance at that time would have caused a delay in providing T.D. with a permanency plan. Lashawn has not shown an abuse of discretion.

## *II. Tina's Petition:*

Tina contends the court erred in retroactively denying reunification based on her past history of substance abuse. She argues because the court ordered reunification services and she complied with the provisions of the reunification plan, it was error for the court to find that her history prevented reunification. She argues Agency failed to inform itself about her progress with Narcotics Anonymous (NA) or find out about available prison programs, thus it failed to follow court orders and to provide adequate information to support a finding of a substantial risk of detriment. Tina is incorrect. Sufficient evidence supports a finding of a risk of harm if T.D. and the other children were returned.

At the 12-month hearing, the court must order the child returned to the parent's physical custody unless it finds by a preponderance of the evidence that return would create a substantial risk of detriment to the child. It is Agency's burden to show detriment. In making the determination the court reviews and considers the social worker's report and recommendations, the efforts and progress of the parent and the extent to which she availed herself of the services provided. (§ 366.21, subd. (f).) On review, the appellate court must decide whether the court's findings are supported by substantial evidence. (*In re John V.* (1992) 5 Cal.App.4th 1201, 1212.)

The court's findings that Tina had not completed the requirements of her reunification plan are well supported. The petitions alleged Tina used marijuana, crystal methamphetamine and cocaine to excess as evidenced by her use of these drugs in the children's presence between August 1999 and February 24, 2000, and the parents' whereabouts were unknown.

When Tina was incarcerated for car theft, the children were left with various people. S.C. then had to call her paternal grandmother for a place for the children to stay because when Tina was released she did not pick them up. S.C. told the social worker she had seen Tina using drugs many times from August 1999 until she last saw her in February 2000. She said Tina "is probably in El Cajon near the intersection of 'Lincoln and Main working the streets [and] she sells her body, has sex for money.' "

From the time the children were taken into custody on February 28 until May, Tina's whereabouts were unknown and she had made no efforts toward reunification. She was arrested on April 25 for possessing and selling methamphetamine. By May 9

she had signed a case plan and on June 7 the court ordered her to participate in the SARMS program Tina complied with the program's provisions from that date on, but when she was incarcerated in September her participation ended. She applied for parenting and recovery services available in prison, but because she had to wait until each program started again, had yet to participate in any of them. Tina acknowledged she had used illicit drugs since age 11. She had been a prostitute to support her drug habit, there had been several prior referrals to Agency and she had attended drug treatment programs, but had gone back to drug use each time. During this dependency period she had shown her ability to stay away from using drugs while out of custody only from the time of her participation in the SARMS program until she was incarcerated.

In determining whether return to a parent's custody will pose a risk of detriment to a child, the court does not consider only the parent's current progress with the provisions of a reunification plan, but all aspects of the case including the parent's past behavior. (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 546.) Recent compliance with reunification plan requirements are not the only circumstance the court must consider. It must decide whether there is a risk of detriment to the child over the long term. (*In re Brian R.* (1991) 2 Cal.App.4th 904, 918.)

Tina has not shown she has been able to refrain from using drugs and from a criminal life style for any long period of time. After T.D.'a birth in 1996, she regained custody of S.A. and M.G. in June of 1997. In October 1998 S.C. also went to live with her and the court terminated jurisdiction over S.C. in May 1999. However, as the court found, from August 1999 until February 2000, when the children were removed, she had

reverted to drug use and prostitution. The mother-infant program which Tina wished to enter with T.D. was an open program from which she could walk away. As the court stated,

"In this situation, considering how long [Tina] has been struggling with the drug addition, the number of programs she testified to that she completed, the number of times she relapsed, the fact that staying straight in custody is easy, it's hard for this court to imagine that I would just have placed this child with [Tina] in the [mother-infant program]."

Substantial evidence supports the court's finding that based on Tina's long history of illegal drug use and the short time she had shown she could remain drug free when she was out of custody, there would be a substantial risk to placing T.D. with her in the program.

The court's finding that reasonable services were offered or provided is also supported. Before Tina's incarceration she was provided with individual counseling with a therapist, she was tested for substance abuse through the SARMS program and provided with substance abuse treatment through the CRASH program, a parenting class and visitation. When she was sentenced to prison for possession and possession for sale of methamphetamine in September 2000, she was no longer able to take advantage of these programs. Although the social worker did not determine what services were available to Tina in prison, she spoke with Tina after her incarceration and they discussed parenting classes available at the California Institute for Women and Tina indicated she knew what services were offered and told the social worker she was following up on the services available to her. The social worker gave the children the letters Tina wrote to

them and took them to visit her at Los Colinas and the California Institute for Women. Tina testified she had registered for a substance abuse recovery class and a parenting class and had secured and was working with a NA sponsor. Delays in beginning the classes came about because Tina was moved from one prison to another. The social worker also spoke with Grisotti about the mother-infant program and testified she attempted to contact Grisotti five or six more times. The social worker determined that the mother-infant program was not appropriate for Tina because she would be incarcerated long beyond the date of the 18-month hearing and it would be detrimental to separate T.D. from M.G. Tina found out about the mother-infant program in November 2000. The social worker explained in a letter dated January 5, 2001, that Agency would not recommend the program because of the length of Tina's sentence. The delay in the social worker's response does not appear prejudicial and Agency's decision not to assist in Tina's application for the mother-infant program is well supported. Although the record indicates the social worker did not do as much as she might have done to assist Tina in securing services while in prison, the standard is not that the best possible services be provided, but that reasonable services are provided under the circumstances. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547.) Tina had access to and applied for services available in prison. She has not shown prejudice in the social worker not providing a prison packet or calling the prison counselor to determine what services were available. It is not Agency's failure to provide adequate services, but Tina's inability to refrain from drug use and a criminal life style that resulted in the termination of reunification services and referral to a permanency planning hearing.

DISPOSITION

The petitions are denied.

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BENKE, Acting P. J.

WE CONCUR:

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HALLER, J.

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O'ROURKE, J.